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July 1, 1996

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Notification of Permitted Written Ex Parte Presentation
MM Docket No. 95-92

Dear Mr. Caton:

CBS Inc. (CBS), by its attorneys and pursuant to Section 1.1206(a)(1) of the Commission's rules, hereby submits two copies of a permitted written ex parte presentation to Commission officials regarding MM Docket No. 95-92. The attached letter addresses CBS's network/affiliate agreements and other issues raised in CBS's pleadings in the docket cited above.

Kindly direct any questions regarding this matter to the undersigned.

Respectfully submitted,

Kevin J. Martin

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

The Honorable Reed E. Hundt, Chairman
Federal Communications Commission
1919 M Street, N.W., Eighth Floor
Washington, D.C. 20054

Re: Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates, MM Docket 95-92

Dear Chairman Hundt:

This is in response to the June 10, 1996 letter submitted by the Network Affiliated Stations Alliance ("NASA"), which asserted that "[c]ertain affiliate contracts . . . contain provisions that we believe are inconsistent with the [right-to-reject] rule." While the NASA letter did not specifically address the terms of CBS network/affiliate agreements, we wish to make it clear that these agreements -- and, to our knowledge, those of the other major networks -- are fully consistent with the Commission's rules.

First and foremost, all CBS affiliates retain the right to make any preemptions that are necessary to satisfy their public interest obligations. As you know, the right-to-reject rule, as now in effect, guarantees affiliates the right (1) to refuse network programming "the station reasonably believes to be unsatisfactory or unsuitable or contrary to the public interest" and (2) to substitute programs of "greater local or national importance." All of CBS's affiliation agreements allow preemption in these circumstances.

Moreover, negotiations with individual stations typically result in agreement on a specified number of hours of network programming that the station may preempt for any reason, in addition to any preemptions which may fall into the above categories. Such agreements are based on individual station and market circumstances and are negotiated at arm's length. The preemptions made pursuant to these agreements may be motivated solely by the station's private economic interests, and do not have to reflect any of the "public interest" considerations that have traditionally been recognized by the Commission.

As the Commission has recognized, networks no longer enjoy -- if in fact they ever did -- an undue advantage in bargaining power with respect to network/affiliate relations. The proliferation of alternative video programming sources, the emergence of three new national television networks, and the growth of larger and more powerful station groups have greatly strengthened affiliate leverage in dealing with CBS and the other established networks.

Indeed, although NASA disputes that affiliate agreements are "free market contracts," the record in this proceeding and in the recent proceeding which resulted in the repeal of the "prime time access rule," In re: Review of Prime Time Access Rule, 11 FCC Rcd. 546 (1995), demonstrate that affiliates today are not lacking in bargaining power in their relationships with the networks. In the New World/Fox deal, in one day, CBS lost VHF affiliates in major markets serving 10.85% of the U.S. television households. (i.e., Cleveland, Detroit, Phoenix, Milwaukee, Dallas, Atlanta, Tampa, and Austin). In the network bidding war that followed, CBS was forced to make major concessions to retain existing affiliates and replace those it had lost. To protect its distribution system, and ensure the continued availability of CBS programming to viewers nationwide, the network entered into costly long-term affiliation arrangements with station owners, including a number of powerful group owners. ABC and NBC were forced to seek similar arrangements. The series of affiliation realignments caused by the New World/Fox transaction alone will reportedly cost the three original networks over $200 million in increased affiliate compensation payments.

CBS believes that the provisions in its existing affiliation contracts strike an appropriate balance between the need for individual licensees to ensure that they have programming flexibility to meet their public interest obligations and the network's need for a reasonable expectation of sufficient clearance to support the enormous cost of its programming and to justify the affiliate compensation CBS has agreed to pay. To achieve this end, in addition to preserving the right of affiliated stations to preempt network programming on public interest grounds, the Commission's rules must recognize the right of a network to negotiate to limit the arbitrary substitution of other entertainment programming for network broadcasts merely because it might be more profitable for the licensee. Such rules would fully protect affiliates in the legitimate exercise of their right to reject network programming for public interest reasons.

Despite NASA's claims to the contrary, the FCC's "right-to-reject" rule does not require that affiliates be permitted to preempt network programming for solely economic reasons. The rule does not guarantee a licensee the right to preempt network programming merely because the local station believes other entertainment programming would attract a larger audience and provide greater net revenues for the station. Allowing affiliates unbridled discretion to "cherry pick" programming would undermine the economic viability of networks, as they would be unable to assure advertisers of the delivery of the full national network audience.

Moreover, any interpretation of the right-to-reject rule which would preclude networks from bargaining with their affiliates to limit economically-based preemptions would simply allow affiliates to enjoy greater financial benefits from the network-affiliate relationship than they freely agreed to in the bargaining process -- a result which clearly should not be dictated by government regulation. Indeed, the NASA letter explicitly requests that the Commission simply deem certain contractual provisions unenforceable (presumably those that contain a negotiated limit to economic preemptions) and allow the affiliate to retain the substantial compensation that was paid in consideration for such provisions.

Finally, despite NASA's argument to the contrary, you were clearly correct in your assertion that "no affiliate organization or group owner has complained to the Commission about" these contracts. Disputes concerning the lawfulness of the conduct of particular parties are routinely considered by the FCC in the processing of complaints or petitions for declaratory rulings as part of the adjudicatory process -- not in response to the filings of generalized comments in notice and comment rulemaking proceedings. Adherence to this traditional procedure is especially appropriate here, in view of the fact that: (a) the NPRM did not give parties notice that such matters were to be considered; (b) the terms of existing network/ affiliate agreements differ markedly from network to network and from station to station; and (c) the right-to-reject rule places responsibility for assuring compliance squarely on the shoulders of each individual local station ("No license shall be granted to a television broadcasting station having any contract . . ."). 47 C.F.R. § 73.658(e). In these circumstances, it is plain that assertions concerning the lawfulness of network/affiliate agreements should be considered only to the extent that complaints are filed which specifically address the terms of actual agreements that have been entered into by particular stations.

In sum, CBS's network affiliation agreements, which are carefully structured over many months during arms length negotiations between CBS and stations owners with substantial market power, are in accord with applicable FCC rules and fully protect the public interest considerations that underlie those rules.

Sincerely,

Richard E. Wiley

Richard E. Wiley
Counsel for CBS

cc: Commissioner James H. Quello
Commissioner Rachel B. Chong
Commissioner Susan Ness
Roy J. Stewart
William E. Kennard

Docket File
Counsel for the Network Affiliated Stations Alliance